content variations if the station consents. The freedom to negotiate over partial carriage makes obvious good sense in the case of retransmission consent. Parties should be able to reach a sensible agreement with regard to partial carriage, even if full carriage is unobtainable.[20/] Even a must carry station should have the opportunity to waive portions of its carriage rights. For example, a station seeking must carry should be able to limit its request to partial carriage, if that partial carriage would facilitate it being included in a system's must carry quota.[21/]

I. VBI Carriage Obligations Should Be Limited

Sections 614 and 615 discuss "content" requirements and provide that an operator must transmit "the primary video . . . in its entirety." The sections are worded somewhat differently, but both focus on the carriage of "program related material" in the Vertical Blanking Internal ("VBI"). CR&B's primary concern here is that the Commission adhere to the

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20/ A broadcast station might, for example, willingly negotiate for carriage of a special program on a system that otherwise does not carry that station.

21/ The statute properly recognizes that the Commission's program exclusivity regulations sometimes require deletions of particular programs from a broadcast signal and authorizes the carriage of substitute programming. 47 U.S.C. § 534(b)(3)(B). The Commission should make clear that the new signal carriage regulations (including the ban on partial carriage and the need to secure retransmission consent) do not apply to signals carried on a "substitute" basis.

copyright definition of "program related" material.[22/] The statute clearly and properly reflects a limit on cable operators' carriage obligations regarding non-program related material.[23/]

J. Existing Technical Rules Meet Must Carry Requirements

The NPRM references the provisions of the 1992 Act regarding signal quality and asks whether the Commission's existing technical standards adequately address these matters. CR&B submits that the Commission's current technical regulations do, in fact, satisfy the new statutory requirements and properly ensure that broadcast signals are carried without material degradation.[24/]

The Commission should clarify that must carry stations are obligated to accept existing circumstances. If the station

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22/ See WGN Continental Broadcasting v. United Video, 51 R.R.2d 1617, 1621 (7th Cir. 1982). (The VBI programming must be "intended to be seen by the same viewers as are watching the [primary program] during the same interval of time in which that [primary program] is broadcast, and as an integral part of the [primary] program.")

23/ Notwithstanding the different treatment of "signal enhancements" in the two statutory provisions, logic dictates that cable operators be allowed to eliminate and then replace signal enhancements.

24/ This does not mean that all broadcast signals will necessarily be delivered at the same quality as satellite signal. If the broadcast signal arrives with inferior quality, that disparity may remain in the subsequent retransmission to subscribers. The Commission has already recognized this principle in its technical standards. Report & Order, 7 F.C.C. Rcd. 2021, 2024 (1992).

does not deliver the requisite signal strength to the cable headend, it is the station's obligation to bear all of the costs (including administrative costs) required to improve the signal. These could include, among other things, improved antennas, increased tower height, microwave relay equipment, and amplification equipment. The parties should be held to good faith cooperation in finding a solution, but all of the costs must be borne by the station.

K. The Calculation Of Activated Channels Should Exclude Channels Which Would Require Additional Expenditures To Be Delivered To Subscribers

A cable operator's must carry obligations vary depending on its number of "activated channels." The NPRM proposes to adopt the definition of "activated channels" set forth in the 1992 Cable Act. Section 2(c)(5) defines "activated channels" as "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers the cable system, regardless of whether such services actually are provided . . . ." 47 U.S.C. § 522(1). CR&B has no objection to incorporating this statutory definition into the Commission's regulations, but urges the Commission to clarify the definition to avoid future controversy.

The definition at issue was first used in the 1984 Cable Act to determine the number of channels a cable operator must make available for commercial leased access. See 47 U.S.C.

§ 522. The FCC originally suggested a rather broad interpretation. In Sierra East Television, Inc. v. Western Cable Television, Inc., 776 F. Supp. 1405 (E.D. Ca. 1991), however, a federal district court advanced a narrower, more practical interpretation. After reviewing the legislative history,[25/] the court concluded that activated channels referred only to "channels actually delivered to subscribers but carrying no programming ('dark channels')." Id. at 1413. It distinguished between dark (but "activated") channels and channels that could be delivered to subscribers only with some additional engineering or equipment. The decision notes that "[N]owhere . . . is there a suggestion that cable operators are under an affirmative duty to engineer, 'grow,' or develop their cable system at any time or in any manner." Id.

The potential burden of meeting must carry requirements and the rapid advancements in cable technology make it imperative that the Commission adopt the interpretation of "activated channels" advanced in Sierra East. The Commmission should make clear that an "activated channel" is one that can be delivered to

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25/ The 1984 Committee Report explained, "The term [activated channels] is used to distinguish between channels which are not being used -- that is, dark channels . . . and channel capacity which the cable system might at sometime in the future be capable of delivering, but is potential channel capacity that is not presently delivered to subscribers." H. Rep. No. 934, 98th Cong., 2d. Sess. at 49, reported in 1984 U.S. Code Cong. & Ad. News, 4655, 4686.

subscribers without the need for additional equipment. That restriction must apply to any equipment, regardless of whether it is needed at the system headend, in the transmission or distribution portion of the plant, or at the subscriber's house. It requires that each system be measured according to its "lowest common denominator." For example, a system that has distributed 36 channel converters must be treated as a 36 channel system, regardless of how the remainder of the physical plant is engineered. A contrary finding "would impermissibly compel [the cable operator] to incur costs for additional equipment and engineering." Id. Surely Congress (concerned as it was with cable pricing) did not intend operators to undertake substantial capital expenditures to comply with this Section.

L. Cable Operators Should Independently Resolve Channel Positioning Conflicts

The 1992 Cable Act's channel positioning provision presents two distinct areas of potential dispute: (1) where broadcasters have conflicting statutory claims to the same channel; and (2) where broadcasters and cable operators must mutually agree to an alternative channel assignment. While the Commission is the appropriate forum to resolve these disputes and is given statutory authority to do so, it should rely heavily on the cable operator's independent judgment. Cable operators are in the best position to work with the stations involved to fashion a compromise that will maximize subscriber satisfaction. The Commission

simply does not have the resources to arbitrate every channel positioning dispute around the country. In fact, the Commission should intercede only where the broadcaster demonstrates that a cable operator did not pursue a resolution in good faith.

To assist cable operators in administering this area, the Commission should articulate three ground rules:

1. Where broadcasters present conflicting statutory demands, the operator should ordinarily assign channels with the following priorities:

(1) off-air channel
(2) January 1, 1992 assignment[26/]
(3) July 19, 1985 assignment

2. The placement of must carry stations on the basic service tier is paramount to any channel positioning request. For example, if an operator chooses to offer its basic service on channels two through thirteen, every broadcaster must limit their channel selection to that band, notwithstanding the fact that their off-air and previous cable assignments were at some higher channel.[27/]

26/ Applicable only for commercial stations.

27/ Broadcasters must, in fact, conform their channel requests to existing operating restraints. An operator cannot be expected to remove "traps" that block reception of certain cable channels simply because the broadcaster has a claim to one of those channels.

This outcome is critical to a sensible resolution of channel positioning requests. Any other approach could burden cable operators with difficult, if not insurmountable, technical problems, which would lead to an intolerable increase in costs and confusion for the consumer.

3. A broadcaster has no right to any particular channel assignment, other than those specifically identified in the statute. Congress could have allowed broadcasters to select from among every cable channel, and instead adopted a more limited approach. The Commission should not impose any additional channel positioning obligations on cable operators.[28/]

M. Notice And Timing Restrictions On Channel Changes and Deletions Should Be Sensibly Interpreted

CR&B does not oppose the suggestion in the NPRM that a 30-day subscriber notice requirement be made applicable to any deletions or repositioning of commercial or non-commercial stations. The Commission should, however, expressly preempt any other notification requirements. CR&B is particularly concerned that a longer notification period would make it extremely difficult, if not impossible, to meet new must carry/retransmission consent obligations.[29/]

28/ While cable operators may consider a broadcaster's request for a uniform channel assignment within its market, the consideration was not expressly identified in the statute and cannot be required.

29/ The notification requirement should be waived in certain cases involving retransmission consent. See Section II, O, infra.

The NPRM also requests comment on the prohibition of deletion or repositioning during ratings periods. Congress could only have meant the four "sweeps" conducted during February, May, July, and November. If the Commission were to extend the prohibition literally to whenever there are any ratings, cable operators would never be able to delete or reposition signals, since ratings in some form are always occurring. In order to meet the principles stated above, especially that of administrative ease and maximum discretion for cable operators, the prohibition must be limited to the four "sweeps" periods.[30/]

N. The Commission Should Attempt To Limit Its Role As The Mediator Of Must Carry Disputes

The Act directs the Commission to consider and act on complaints brought by commercial and non-commercial stations dissatisfied with the manner in which a particular cable operator has met its must carry obligations. The Commission need not, however, feel obliged to step into every squabble between a cable operator and a disappointed broadcaster. The Commission simply should not put itself into the position of second guessing an operator's routine carriage decisions. To minimize this problem, the Commission should afford cable operators substantial

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30/ The prohibition should apply only to signal changes made "during" a "sweeps" period, and not changes made at the beginning of such a period. Because copyright accounting begins anew for the second half of the year in July, operators must often make signal changes between June and July.

deference. It should declare that as long as an operator's decision is not "arbitrary and capricious" it will be upheld. Carriage decisions (including channel positioning) should not be reversed unless it is shown that the operator acted in bad faith or clearly misinterpreted governing law.

On a procedural note, the proposal that cable operators be given just ten days to respond to a broadcaster complaint filed at the Commission should be rejected as unduly burdensome. A thirty-day response period is more appropriate and in line with other Commission complaint procedures. (See Section §1.724).

O. The Commission's Existing Program Exclusivity Rules Should Be Modified To Reflect New Must Carry Obligations

The NPRM inquires as to the effect the reimposition of must carry will have on other Commission rules. The Commission rightfully expresses concern about the situation where a cable system is simultaneously required to carry a station under the 1992 Act and to delete a portion of its programming pursuant to the Commission's exclusivity rules. This phenomenon could occur quite frequently, as a commercial station's new must carry zone (i.e, its ADI) may far exceed the territory in which it is automatically exempted from exclusivity blackouts.[31/]

31/ That territory is defined by a combination of grade B contours, significantly viewed status, and 35/55 mile zones.

One option for the Commission to consider would be to eliminate the program exclusivity rules altogether. The program exclusivity rules function largely as an inducement for cable operators to carry certain stations (those with local exclusivity rights) over distant signals. Now that must carry has been reimposed, the justification for retaining the program exclusivity rules is less clear.[32/]

A less drastic step the Commission should undertake to resolve the particular concern raised in the NPRM would be to add a new exemption to the program exclusivity rules. Under the new exemption, no television station would be deleted in any area in which it could invoke must carry (even if it actually elected retransmission consent). Thus, for a commercial station, the exemption would apply to any system located within its ADI. For NCE stations, the 50-mile/grade B zone would apply.

P. The Commission Should Update Its List Of Top 100 Markets

Congress has directed that the Commission update the list of the top 100 markets codified at Section 76.51 of its rules. This list has no direct bearing on the new must carry

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32/ The need for review is even more compelling in the case of stations invoking retransmission consent. The possible ramifications of combining retransmission consent and program exclusivity obviously were not considered by the Commission when it adopted its program exclusivity rules.

regime, which focuses instead on current ADI designations. It is still used, however, for purposes of the FCC's program exclusivity regulations and in assessing a system's copyright status under 17 U.S.C. § 111.[33/]

CR&B submits that the Section 76.51 list should be updated to reflect changes during the past two decades. The update should then apply to the existing program exclusivity rules (to the extent they remain) and copyright calculations. There may be some dispute as to whether this update can affect copyright, which is based on the "Rules, Regulations and Authorizations of the Federal Communications Commission in affect on April 15, 1976." The FCC, for its part, should state that cable systems and their subscribers should be able to take advantage of these market changes. If Congress had not wanted this to be the case, there would have been little reason to suggest an update of the Section 76.51 list. At the same time, any favorable copyright treatment based on the original Section 76.51 list should be "grandfathered." Such treatment has been permitted in the past to avoid service disruption.[34/]

33/ The royalty fees paid by a larger cable system depend today in large part on its market assignment under Section 76.51. Systems in "major" markets can generally import more "distant" signals at a favorable rate than can similar systems in "smaller" markets. The variation traces back to the different distant signal quotas assigned to these systems under the Commission's old signal carriage regulations.

34/ Copypright Office's Policy Decision on Cable License.

II. RETRANSMISSION CONSENT

As noted earlier, the entities represented in this proceeding by CR&B strongly oppose retransmission consent. CR&B offers these Comments only to assist the Commission fulfill its statutory obligation. In no event should participation in this proceeding be construed as an endorsement or acceptance of paying broadcasters for retransmission consent.

Retransmission consent has the potential for imposing great disruption to cable television and its delivery of broadcast signals to the public. That disruption cannot be contained by cable operators alone. The Commission's rules must attempt to minimize the likelihood and severity of any adverse consequences. For that reason, adoption of an implementation schedule coordinating both retransmission consent and must carry is particularly important.

A. Cable Operators Are Not Required To Reach A Carriage Agreement With Stations Invoking Retransmission Consent

The Commission should clarify that a broadcaster intent on extracting compensation for the carriage of its signal does so at its own risk.[35/] Under the new Act, a cable operator is under

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35/ Indeed, some signals invoking retransmission consent may end up paying cable systems for carriage. The statutory ban on broadcasters paying for carriage applies only to stations electing must carry. 47 U.S.C. § 534(b)(10).

absolutely no obligation to accede to a broadcaster's demand. It makes no difference whether the broadcaster is "local" or "distant." Nor does it matter whether the demand is large or small, or whether it is for payment, barter, or some other form of consideration.

To avoid any possible confusion, the Commission should expressly preempt any laws, regulations, or franchise agreements which would otherwise compel a cable operator to carry a broadcast station invoking retransmission consent. It would be patently unfair to allow a third party broadcaster to take advantage of that situation by extracting compensation from a cable operator.[36/]

B. Retransmission Consent Must Be Distinguished From Copyright, And Broadcasters, Not Programmers, Must Control Its Exercise

The purported rationale for retransmission consent is that it governs cable carriage of the broadcast signal, not the individual programs included in that signal.[37/] For the latter,

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36/ CR&B fears that compliance with must carry and retransmission consent will aggravate and confuse local franchising authorities. The Commission must do whatever it can to assist cable operators in this regard.

37/ See S. Rep. at 36. (The Committee is careful to distinguish between the authority granted broadcasters . . . to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.")

cable operators must continue to look to the compulsory copyright license created under Section 111 of the 1976 Copyright Act.

It is far from clear that the distinction between retransmission consent and copyright can be maintained. CR&B's own assessment is that retransmission consent is really copyright by another name. As such, it is redundant and irreconcilable with the carriage rights conveyed under Section 111. But if the Commission is to have any hope of fashioning operative regulations, it must clearly distinguish between retransmission consent and copyright. Retransmission consent was intended, and should remain, the province of broadcasters, not programmers.[38/]

Ironically, the NPRM considers the underlying tension between retransmission consent and copyright only briefly in its final pages. The Commission then links retransmission consent and copyright together by suggesting that a broadcast station can contract away its retransmission rights through program licensing agreements. While Section 6 of the 1992 Cable Act and the accompanying Senate Report arguably reveal some reluctance to

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38/ See Monroe County Bd. of Commissioners, 72 F.C.C.2d 683 (1979) ("All that is required by Section 325(a) is that consent be obtained from the originating station. Neither the statute nor our rules require the consent by anyone else . . . . To construe Section 325(a) to require the consent of each program syndicator on a program by program basis would effectively read into the Act a requirement not imposed by Congress); Blair Broadcasting of California, Inc., 48 R.R.2d 1551 (1981).

interfere with the contractual relationship between program suppliers and broadcasters, the language cited in the NPRM neither explicitly nor implicitly binds the Commission.[39/] The Commission should, in fact, preempt program licensing agreements that in any way limit a broadcaster's subsequent exercise of retransmission consent. A failure to adopt such a prohibition runs the grave risk of rendering retransmission consent inoperable.

For retransmission consent to work, broadcasters must have unfettered discretion to negotiate with cable operators. They should not be bound by licensing agreements or network affiliation agreements that lock them into a particular form or amount of compensation or limit their ability to grant

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39/ The key statutory passage simply notes that retransmission consent was not intended to "affect[] existing or future video programming licensing agreements." 47 U.S.C. § 325(b)(6). Contrary to the interpretation advanced in the NPRM, that language should be read as establishing retransmission consent as a non-copyright matter, operating entirely outside the sphere of programming contracts.

The key passage in the Senate Report simply states that "nothing in this bill is intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing licensing agreements." S. Rep. at 86. Again, the Senate's intent concerning operation of the newly created retransmission consent right is far from clear. Even if the passages cited in the NPRM are read to mean that the statute allows broadcasters to contract away potential retransmission consent rights, that reading does not require the Commission to reach the same result.

retransmission consent.[40/] Otherwise, operators will be unable to negotiate consentual arrangements between systems and the affected broadcasters.

Commission regulation of television program licensing agreements would be nothing new. Section 73.658 of the FCC rules already includes a host of provisions designed to avoid certain "free market" arrangements the Commission deems undesirable. CR&B submits that a new provision should be added to Section 73.658 that would directly address retransmission consent. The goal would be to ensure that broadcast licensees, rather than programmers, control retransmission consent. The new provision should state:

> No television broadcast station shall enter into any contract, arrangement, or understanding, expressed or implied, with a program producer, distributor, or supplier, a network organization, or any similar entity which prevents or hinders the station from granting retransmission consent to a multichannel video distributor or which adjusts licensing fees or other compensation based on the granting of retransmission consent.[41/]

40/ Interestingly, the Fox organization, whose subsidiaries include both programmers and broadcasters, has evidently recognized the need to treat retransmission consent as a broadcaster's prerogative. While Fox stations have been encouraged to exercise retransmission consent to their advantage, the Fox studio has disclaimed any intention to interfere in that exercise.

41/ The preemptive sweep of the provision must encompass both market and non-market situations. The Commission should

[Footnote Continued Next Page]

The proposed restriction would be entirely consistent with the Commission's existing regulatory approach to television programming arrangements. Thus, programmers entering into new agreements would have absolutely no basis to complain. As to any existing agreements already purporting to restrict the exercise of retransmission consent, CR&B submits that those provisions should be declared unenforceable with regard to the particular rights created under the 1992 Cable Act. Retransmission consent is a new federal right, defined by statute and Commission regulation. The Commission is free to define retransmission consent as a broadcast prerogative that cannot be compromised through private contract.42/

C. All Multichannel Video Programming Distributors Must Be Equally Subject To Retransmission Consent

Much of the 1992 Cable Act is purportedly directed towards creating a level playing field for multichannel video programming distributors. It is somewhat surprising, therefore,

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[Footnote Continued]

resist any suggestions that "compromise" the issue by allowing restrictions in the case of non-market systems. Hundreds of cable systems carry "regional" stations beyond their ADI. It would be extremely disruptive to allow programmers or network organizations to control retransmission consent even in these cases.

42/ Programmers are, of course, entitled to consider the proceeds broadcasters may secure from retransmission consent in establishing initial licensing fees.

that the NPRM raises the possibility that all such distributors might not be similarly subject to retransmission consent. Section 6 plainly states that "no cable system or other multichannel video programming distributors shall retransmit the signal of a broadcast station . . . except . . . with the express authority of the originating station." Given this statutory language, and the overarching goals of the 1992 Cable Act, it is quite clear that all multichannel video programming distributors, including SMATV, wireless cable, and DBS operators, are subject to retransmission consent. Any regulations adopted should be framed to apply equally to non-cable multichannel video programming distributors. The fact that these entities may have different copyright authority is irrelevant for purposes of administering retransmission consent.[43/] As explained in the preceding section, copyright and retransmission consent must be handled as separate matters.

D. Only Television Broadcast Stations Can Exercise Retransmission Consent[44/]

The NPRM asks whether retransmission consent applies to radio, as well as television. It notes that Section 6 initially

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43/ CR&B does not object to the proposal in the NPRM that the burden of securing retransmission consent "should fall on the entity directly selling programming and interacting with the public," rather than on the licensee of any leased facilities.

44/ Jones Intercable does not wish to participate in this section of the Comments.

addresses the retransmission of "a broadcast station" without expressly limiting itself to television. The notion that Section 6 somehow encompasses radio must be emphatically rejected. The suggestion in the NPRM that "[i]t is not evident from the legislative history and from the context in which the 1992 Act was adopted whether Congress intended to apply the retransmission provisions to signals other than television signals" is simply wrong. Congress clearly had no such intention. If the statute is less than precise, it is only because the drafters lacked any reason to suspect that the provision would be subject to such a tortured construction.

The legislative history of the 1992 Cable Act is replete with references to retransmission consent in the television context, without any mention of radio. Moreover, the structure of Section 6, including its explicit instruction to the Commission to develop regulations governing the exercise of retransmission consent by "television broadcast stations," makes no sense if the Section were intended to also encompass radio. It simply is not credible that Congress intended Section 6 to govern radio, without including any discussion of how retransmission consent should apply to that medium.45/

45/ The Commission should also clarify that neither must carry nor retransmission consent apply to foreign (e.g., Mexican or Canadian) signals. Congress' concern in adopting both provisions was clearly limited to domestic broadcasters.

E. Only "Originating" Stations, Not Translators, Can Invoke Retransmission Consent

Although the NPRM does not raise the issue, the Commission must clarify which television broadcast stations are entitled to invoke retransmission consent. The statute seems to require prior consent for the retransmission of any broadcast signal -- including a translator station. The more difficult question is who grants the retransmission consent in the case of a translator station. The statute requires multichannel video distributors to secure "the express authority of the originating station." (emphasis added). CR&B submits that the "originating station" in this context should be defined as the parent station that makes the first broadcast of the signal. Translator stations would be excluded by that definition. Accordingly, if a multichannel video distributor intends to retransmit a translator station, it should turn to the primary station, not the translator, to secure retransmission consent.

F. Broadcasters May Make an Election Between Must Carry and Retransmission Consent On A System-By-System Basis, But Must Accommodate Smaller Systems and Make A Uniform Election For Systems With Significant Service Overlap

A broadcaster's ability to elect between must carry and retransmission consent is strictly limited to those systems within its ADI. Retransmission consent will be the only option available to broadcasters (including regional superstations) with regard to non-market systems.

CR&B concurs with the Commission's tentative conclusion that broadcasters should ordinarily be allowed to make different elections between "must carry" and "retransmission consent" for different cable systems within the market.[46/] But CR&B is concerned that disparate bargaining power may adversely affect smaller cable systems and their subscribers. Broadcasters, looking at overall market ratings, have little to fear from being dropped by smaller systems. To avoid abuse, CR&B suggests that cable operators serving less than 5% of the households in their television market automatically be extended retransmission consent on equal terms with the "most favored" cable operator in the market.

CR&B also supports the Commission's efforts to define those situations where an overlap in cable service area requires uniform treatment between different systems. Congress obviously created the "overlapping service area" exception as part of its

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46/ Must carry/retransmission consent election must respect the technical integration of cable systems. A station must not be allowed to force its way onto part of a system through must carry and then extract retransmission consent payments for carriage on another technically integrated part of that system.

The definition of technical integration may be subject to debate. For purposes of its technical rules, the Commission identified any systems sharing at least 75 percent of all video signals as technically integrated. CR&B supports adoption of the same test here. The Commission must respect an operator's technical decisions and not impose any obligation effectively requiring the operator to disassemble a technically integrated system.

general effort to level the playing field among competitors. Where the actual overlap is of relatively little significance to either operator, the need for the exception is minimized. Rigidly imposing a uniform election in those cases could create a troubling domino effect. The exception should, therefore, ordinarily be applied only in those cases where the overlap encompasses at least 5% of the households in any system's service area -- with parties retaining the right to petition for a higher or lower cut-off on a case-by-case basis. To ensure fairness, the Commission rules should also require broadcasters to offer retransmission consent on the same terms to those overlapping systems.47/

G. Every "Local" Broadcast Signal Carried, Including A Station Carried Pursuant To Retransmission Consent, Should Count Towards A Cable System's Must Carry Quota

CR&B fully supports the Commission's tentative conclusion that signals carried pursuant to retransmission consent (but which were otherwise eligible for must carry) should count towards a system's must carry quota. That conclusion is consistent with congressional intent. The Senate Report states, "[T]he Committee intends that stations which exercise their retransmission rights and are carried by cable systems will be

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47/ Although this Section talks in terms of cable systems, it should be applied to all multichannel video programming distributors.

counted towards the total number of stations required to be carried under Sections 614 and 615." S. Rep. at 84.

The quota approach was adopted to minimize the intrusion on a cable operator's editorial discretion. As the House Report explains, "[B]y limiting the number of channels that may be required to be devoted to must carry signals, the legislation preserves the discretion of cable operators to provide their own choice of other programming to their subscribers." H. Rep. at 58. The balance Congress sought to achieve through the "one-third" quota would be quickly eviscerated if the stations an operator would normally use to satisfy its must carry quota elected retransmission consent and could not count towards fulfilling the must carry quota.

The result of such an interpretation would be ludicrous. Assuming all the stations cable operators want to carry elect retransmission consent, cable operators could be required to devote substantially more than one third of their channel capacity for the carriage of commercial broadcast stations.[48/] The FCC must avoid that result.

48/ The same problem would occur in cases where a cable operator voluntarily carries a station that initially elects must carry, but then refuses to pay the related copyright and signal quality costs. Carriage of these stations should count towards the must carry quota, even though, strictly speaking, they do not qualify for must carry.

H. Broadcast Stations Electing Retransmission Consent Should Be Allowed To Negotiate Over Ancillary Carriage Terms, Including Those Terms That Are Non-Negotiable In The Must Carry Context

CR&B also supports the Commission's tentative conclusion that parties engaged in retransmission consent discussions should be free to negotiate over all carriage terms. The premise underlying retransmission consent (as opposed to must carry) is that the cable operator can reject a broadcaster's compensation demands and not carry that particular station at all. Logic suggests that the parties should have the implied "lesser" right to negotiate over "partial" carriage.

Must carry artifically imposes a variety of ancillary carriage terms on cable operators. In the "free-market" world of retransmission consent, all those terms should be subject to negotiation. Parties should be free to fashion a carriage arrangement that makes sense for them. In particular, they should be allowed to reach a carriage agreement for a portion of the broadcast day. The language of Section 6 expressly recognizes this carriage possibility, by specifying that retransmission consent shall govern carriage of "a broadcast station, or any part thereof."[49/]

49/ The NPRM expresses concern as to how "partial" carriage pursuant to retransmission consent should be reconciled with copyright laws, which require payment for carriage of the full signal even if the entire program schedule is not car-

[Footnote Continued Next Page]

The NPRM at one point assumes that a retransmission consent signal counts toward the must carry quota and that a cable operator can carry a portion of a retransmission consent signal. It then asks how that partial carriage should count towards meeting quota obligations. As the station at issue has voluntarily surrendered its must carry rights in exchange for retransmission consent, it follows that any subsequently negotiated carriage, regardless of the broadcast time involved, should count as a full quota signal.50/

I. The Commission Should Not Subject Parties Engaged In Retransmission Consent Negotiations To Mandatory Arbitration

The NPRM cites references in the Senate Report to the Commission imposing arbitration requirements to ensure continued cable carriage of particular broadcast signals. That suggestion was obviously inserted into the legislative record to placate those who feared the disruptive impact of retransmission consent.

[Footnote Continued]

ried. The concern is misplaced because the dichotomy already exists under the current (non-must carry) regulatory environment. Cable operators today are free to carry a portion of a station's broadcast day, provided they make full copyright payment. The introduction of retransmission consent will not in any way change or complicate this practice and, thus, no special Commission action is required.

50/ Consistent with the general flexibility surrounding the operation of retransmission consent, negotiating parties should be allowed to enter into binding agreements extending beyond the initial three year election period.